MOTION FILED

No.— 82-1044

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

UNITED STATES HOUSE OF REPRESENTATIVES, APPELLANT

v.

FEDERAL TRADE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

A Motion for Leave to file Amici Curiae Brief,
and the Brief Amici Curiae of
The Honorable Charles Pashayan, Jr.,
The Honorable Trent Lott,
The Honorable Charles Elson Roemer III,
The Honorable Eugene A. Chappie,
The Honorable Vic Fazio,
The Honorable Thomas N. Kindness
The Honorable Norman Yoshio Mineta,
The Honorable Marvin H. Mickey Edwards,
and the Honorable Gerald B. Solomon
Members of the United States House of Representatives,
In Support of Appellant

Honorable Charles Pashayan, Jr.
Member of the United States House
of Representatives
129 Cannon House Office Building
Washington, D.C. 20515
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Tuesday, June 28, 1983

Amicus Curiae

MOTION

This Motion to file the annexed amici curiae brief, in support of Appellant in United States House of Representatives v. FTC, S. Ct. No. 82-1044 ("Used Car Case"), out of time, is submitted for the reason that the Court's recent decision in Chadha v. INS has prompted amici to submit the annexed brief in the nature of intervening matter under Rule 22.6, for the Court's consideration. The interest of amici, The Honorable Charles Pashayan, Jr., The Honorable Trent Lott, The Honorable Charles Elson Roemer III, The Honorable Eugene A. Chappie, The Honorable Vic Fazio, The Honorable Thomas N. Kindness, The Honorable Norman Yoshio Mineta, The Honorable Marvin H. Mickey Edwards, and the Honorable Gerald B. Soloman, derives from their individual membership in the United States House of Representatives. The brevity of time makes it unlikely that Counsel of the House shall be able to file any further supplemental briefs under Rule 22.6.

Amici curiae believe that the Court should grant plenary consideration in the Used Car Case for the following reasons:

1- The statutory authority to issue broad rules and regulations in the Used Car Case is fundamentally different from the adjudicatory nature of the proceeding in Chadha; see Separate Concurring Opinion of Justice Powell in Chadha v. INS.

2- Historical materials, believed not to be before the Court in Chadha, exist that indicate that intrinsic in the legislative power vested in Congress by Article I is Congress's Constitutional right to reserve by statute the option to nullify agency or departmental rules and regulations by the legislative veto, all of which are non-textual to the Constitution.

As the dissenting justice opined, the decision may broadly affect the provisions in a wide range of statutes. The Court is well aware that ststutes are to be saved from unconstitutionality if possible. The Chadha decision is too blunt an instrument to adjudicate the rule-making legislative vetoes at issue in the FTC case. Full argument and briefing will enable the Court to determine whether these devices, applied in a wholly different context from Chadha, are also unconstitutional.

The importance of the questions presented in this case can hardly be disputed, affecting as it does virtually hundreds of agency rules and regulations. Indeed, speculation has already arisen concerning the reach of Chadha to other legislative review devices, and to clarify the applicability of its ruling the Court should order full briefing and argument to make it clear whether the Chadha ruling is dispositive.

AMICI CURIAE BRIEF

ARGUMENT

The historical material submitted herewith fully indicates that legislative review and management of delegated legislation were used by both Parliament and the early American Congresses. This material alone provides support for granting plenary consideration in the Used Car Case to asses the different stiuation presented by rule-making review mechanisms.

I. The Historical Development of Delegated Authority and Its Management.

Contrary to many statements made by counsel and in briefs in both the Chadha and the present case, neither delegated legislation nor the legislative veto find their origins in the 20th Century. Rather, the origins can be traced deep into British history, into the history of the American colonies, and into the history of the first American Congresses.

A. Delegated Authority.

1. British.

Apart from at least two early statutes, one passed by Parliament in 1337 (10 Edward III, c. 1), and the other in 1385 (III Rolls of Parliament 204), most scholars fix the reign of Henry VIII as the beginning of delegated authority in the modern sense. The Statute of Wales (34 and 35 Henry VIII, c. 26), enacted in 1542-43, authorized Henry VIII to issue rules for governing Wales, including the power to levy taxes (see also 28 Henry VIII, c. 17; and 1 Edward VI, c. 11; and 31 Henry VIII, c. 5). The Statute of Sewers, enacted in 1531, remarkedly modern, granted Commissioners "full Power and Authority to make, constitute, and ordain Laws, Ordinances, and Decrees..." (23 Henry VIII, c. 5, s. 1). (For examples in the Seventeenth Century, see 12 Charles II, c. 22; 13 and 14 Charles II, c. 5; and 22 and 23 Charles II, c. 8.) Despite the fact that Eighteenth Century statutes were passed in great detail, Parliament continued delegating legislative authority. In 1769, for example, Parliament passed an act empowering certain harbor commissioners "to make such By-Laws, Rules, Orders, and Regulations, as shall be found necessary for the Purposes in this Act..." (9 George III, c. 8, s. 10). Some were couched in broad statutory terms (see, e.g., 2 George III, c. 32; 10 George III, c. 27; 15 George III, c. 65; 16 George III, c. 62; 31 George II, c. 25; 15 George III, c. 21; 6 George I, c. 18; 30 George II, c. 20; 19 George II, c. 5; 14 George III, c. 19; 13 George II, c. 3; and 30 George II, c. 1).

Others were passed to regulate the delegatee's affairs (see, e.g., 16 George III, c. 13; 31 George II, c. 18; 15 George III, c. 24; 15 George III, c. 21, 16 George III, c. 61; 6 George III, c. 24). Yet others combined these (see, e.g., 10 George III, c. 25; 9 George III, c. 13; 9 George III, c. 21; 15 George III, c. 60; 15 George III, c. 66; 9 George III, c. 22; 7 George III, c. 85; 9 George III, c. 22; 9 George III, c. 21; 14 George III, c. 56, and 9 George III, c. 31).

Particularly notable is Eighteenth Century British delegated legislation regarding the American colonies. Four are especially notable. In 1774, Parliament passed an act to discontinue shipping activities in Boston, and conferred on the King, by Order in Council, the power to make important legal definitions (14 George III, c. 19). Later that year, Parliament gave the Council for the Affairs of the Providence of Quebec the power to make ordinances (14 George III, c. 83). In 1765, Commissioners for Managing the Stamp Duties were granted the authority to make "Rules and Orders..." (George III, c. 13).

Most noteworthy is an act passed in 1778, granting Commissioners the power to make "Regulation, Provision, Matters..." to quiet disorder (18 George III, c. 13), but they should not become effective until confirmed by Parliament.

2. Early Congressional Delegated Authority.

That the idea of delegated legislation was, along with other principles of English government, a part of the British inheritence which not only formed the background for the writing of the Constitution but also the guidance for Congressional practice, is evident from the early Acts containing provisions for delegated legislation. For example, in 1791, the Congress passed "An Act to incorporate the subscribers to the Bank of the United States," which provided, "The President, Directors and Company, of the Bank of the of the United States... [shall]... ordain, establish, regulations, as shall seem necessary and

convenient for the government of said corporation" (1st Cong., Sess. III, Ch. 10). This Act is not dissimilar in form to the British Acts of the Eighteenth Century, containing provisions for delegated legislation. Thus, the early American Congresses took up the centruies-old Parliamentary practice of delegated legislation. It is clear that they regarded it as inherent in Article I legislative power.

B. The Legislative Management of Delegated Legislation.

Like the subject it is meant to manage, the legislative veto evolved from its British antecedents, called the "laying system." While massive use of both delegated legislative authority and the laying system and legislative veto is a relatively modern phenomenon, its origins are traceable into British Parliamentary and American Congressional history. In each, again, it is clear that the early Congresses regarded procedural management of delegated legislation as intrinsic to its Constitutional legislative power.

1. British Antecedents.

British statutes, many passed in the Eighteenth Century, required the delegatees to lay before Parliament matters relating to finances or monies (see, e.g., 1 George I. c. 21; 23 George II, c. 24; 9 Anne, c. 21; 27 George III, c. 13; 33 George III, c. 29; 13 George III, c. 83; 33 George II, c. 11; and 31 George II, c. 38).

The laying procedure was also applied to account for government activities in general (see, e.g., 28 George III, c. 54; 29 George III, c. 66; 30 George III, c. 33; 23 George II, c. 31; 25 George II, c. 40; 24 George III (Session 2), c. 25; 33 George III, c. 52; 23 George II, c. 24; 30 George II, c. 1; 31 George II, c. 37; 12 George III, c. 37; 15 George III, c. 31; 15 George II, c. 29; 16 George II, c. 26; 18 George II, c. 25; 17 George II, c. 30; 22 George II, c. 42; 7 George III,

c. 58; 10 George III, c. 40; 21 George III, c. 58; 26 George III, c. 43; 8 George II, c. 29; 9 George II, c. 42; and 26 George III, c. 107). Likewise, Parliament passed a few acts requiring the laying of judgments and decrees (see, e.g. 31 George II, c. 39; 2 George III, c. 37; 20 George III, c. 38; 22 George III, c. 80; 31 George c. 39; 2 George III, c. 37; 20 George III, c. 38; 22 George III, c. 80; 5 George III, c. 8; and 31 George II, c. 24).

Parliament passed statutes requiring that delegated legislation be laid. In 1791, the King himself was required to lay before Parliament orders he was authorized to make in respect the prices of corn (31 George III, c. 30; see also 33 George III, c. 65; 39 and 40 George III, c. 87; and 23 George II, c.31)

Most importantly, in the 1778 Act cited supra (18 George III, c. 13), Parliament empowered certain colonial officials to issue regulations, which could not take effect without Parliament's approval. While this statute did not have an explicit laying provision, it is to be substantively inferred from the requirement for approval.

These measures taken by Parliament at oversight and management bear significant precedence for their development in the United States, and establish that the whole body of informal law and management developed along with formally enacted statutes.

2. American Control.

It was indeed no more an accident that the early Congress adopted the laying procedure than the other British procedures (see, e.g., Burleigh Cushing Rodick, American Constitutional Custom: A forgotten Factor In The Founding (New York, 1953)). "The early House of Representatives also resembled the Commons in its system of standing committees, its committees of the whole, its rules for debate and the conduct of its members" (at 117).

Thus, in emulation of the British statutory language, several Congressional

statutes required that the various delegatees "lay before" Congress various matters (see, e.g., 1st Cong., Sess. II, Ch. 22; 5th Cong., Sess. II, Ch. 38; 8th Cong., Sess. I, Ch. 46; 3rd Cong., Sess. II, Ch. 43; 4th Cong, Sess. I, Ch. 21; 10th Cong., Sess. II, Ch. 17; 3rd Cong., Sess. II, Ch. 45; 7th Cong., Sess. I, Ch. 32; 10th Cong., Sess. II, Ch. 28; 11th Cong., Sess. II, Ch. 37; 7th Cong., Sess. II, Ch. 27; 3rd Cong., Sess. I, Ch. 14; and 8th Cong., Sess. II, Ch. 26).

Most important, there are two notable examples of the laying of delegated legislation. After the Louisiana Purchase, the Congress in 1804 passed an act dividing Louisiana into two territories. In establishing the government for the territories, Congress granted rule-making authority to the governors, but made the rules subject to the legislative veto:

> The legislative power shall be vested in the governor, and in thirteen of the most fit and discreet persons of the territory.... The governor shall publish throughout the said territory, all the laws which shall be made, and shall from time to time report the same to the President...to be laid before Congress; which, if disapproved of by Congress, shall thenceforth be of no force (8th Cong., Sess. I, Ch 38, s. 4) (emphasis added).

In 1805, the Congress passed an Act containing an almost identical provision (8th Cong., Sess. II, Ch. 31). These are among the clearest examples of the development of the legislative veto as an inherent aspect of Article I legislative power. The Congress clearly followed in the footsteps of Parliament in employing the laying procedure to control the delegate's exercise of delegated legislation. These Congressional statutes are indeed in the nature of the 1778 Act, cited supra, in which the delegated legislation should not become effective without Parliament's approval.

C. Conclusion.

By vesting all the Legislative power in the Congress, the Framers had in mind more than the procedural sequence prescribed in Article I, Section 7, as

circumscribed by Section 8 and the other limitations. The early Congress's adoption of Parliamentary rules, procedures, and the laying system, is evidence that the legislative power was meant to include both delegated legislation and its management by procedural device.

II. A Comparison of the British and American Doctrines of Separation of Powers.

It is a mistaken notion in the United States that there is "no Constitution" in Britian and therefore no separation of powers. Certainly neither should be invoked to invalidate the historical development and precedent of delegated legislation and the laying system and legislative veto.

The orthodox view in British legal theory is that there is a British Constitution, much of it written (see, e.g., D.C. M. Yardley, Introduction to British Constitutional Law (London, Fourth Edition, 1974). It embodies a doctrine of separation of powers that separates the Crown as the executive from Parliament as the legislative (see, e.g., John Locke, Second Treatise, Chapter XII, Sec. 147, as supported by M. J. C. Vile, Constitutionalism and the Separation of Powers (Oxford, 1976); Sir William Blackstone, Commentaries on the Laws of England; and Montesquieu, The Spirit of the Laws; see also various Eighteenth century British statutes, e.g., 12 and 13 William III, c. 2, prohibiting Crown officials from being members of Parliament; see also 6 Anne, c. 7; 15 George III, c. 22; 25 George III, c. 52; 22 George III, c. 80; 23 George III, c. 87; 20 George III, c. 38; 20 George III, c. 49; and 20 George III, c. 54. See also various regency acts, 1 William and Mary, Second Session, c. 2; 12 and 13 William III, c. 2, and 5 George III, c. 27. See also, e.g., 16 George III, c. 34, and 5 George III, c. 8, for descriptions of the power to execute laws as vested in agents of the Crown.).

Members of the British Cabinet wear two hats: legislative, as ordinary members of Parliament; and executive, as agents of the Crown. While this arrangement would now violate the Ineligibility and Incompatibility Clauses, the

division of these powers remains intact in British theory.

The methods of amending the two constitutions differ: in Britian, the process is the same for changing the constitution as for passing an ordinary statute. But the constraints of custom and convention play a prominent role in British Constitutional law, making changes in the British Constitution markedly more difficult, as it is more difficult to amend the American Constitution than to pass statutes.

In respect to the legislature's right to manage delegated legislation, the relationship between Congress and Parliament is analogous and should offer support to the validity of the legislative veto.

III. Conclusion.

The Court in Chadha implies that the Framers envisioned only a textual method of legislating. But British practice, well-known to the Framers and in many instances explicitly or impliedly incorporated in early Congressional practice, strongly indicates that the Constitution's Article I legislative power was intended to comprehend both delegated legislation and the legislature's right to review and manage it by parliamentary procedure.

Chadha concerned a particular agency action concerning a particular individual. In the Used Car Case, something quite different is at stake: broad rules and regulations affecting a class, which itself in the future will require individual application by the issuing agency.

Secondly, Chadha decided against a one-house legislative veto, whereas the Used Car Case involves a two-house legislative veto. The historical evidence is ample that both in Parliamentary and early Congressional practice, the historical right to manage delegated legislation was exercised by the whole legislature, Parliament or Congress.

On these two main distinctions, amici curiae submits that the Court should grant plenary consideration in the Used Car Case.